No. 12183.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. MCCLYMAN, ELIZABETH SPENCER SAUERS, ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

The appellants herein, petitioning creditors in the trial court, filed their First Amended Involuntary Petition in Bankruptcy on October 28, 1947, and respondent, defendant in the trial court, filed his answer thereto on November 26, 1947, and his Supplemental Answer thereto on December 19, 1947. Said petition alleged respondent to be a partner in the partnership known as Brunson and Bunch. Respondent filed his request for jury trial on November 26, 1947. Said respondent subsequently and prior to the commencement of said trial, withdrew his said request for a jury trial, and the action was tried by the court sitting without a jury. The District Court had jurisdiction of the matter by reason of the provisions of the U. S. Code, Title 11, Chapter 3, Section 21, and this court has jurisdiction to determine herein the within appeal by the provisions of U. S. Code, Title 11, Chapter 4, Section 47. [Tr. of Record p. 21 to and including p. 77.] Order of General Reference. [Tr. of Record pp. 8, 9 and 10.]

Statement of the Case.

The said First Amended Petition alleged respondent to be a partner in the partnership known as Brunson & Bunch, and the Answer thereto denied that respondent was a partner therein, and that he was insolvent. A number of persons, in excess of sixty-five, had invested monies in said partnership through the solicitation, personal and by agent, of respondent. At the trial of the action, appellants offered to prove by evidence tending to show fraudulent misrepresentations made to them by respondent, and evidence tending to show a general plan and scheme to defraud said persons of said investments originating with and perpetrated by respondent, and the admitted members of the said partnership. The trial court wholly excluded this evidence on the ground that it did not tend to show that respondent was a partner in said partnership, and had no bearing on the issues before the court; that the trial court further stated that the only issues before the court were whether or not the respondent was a partner, and if so, whether he was insolvent. At the conclusion of the trial, the court made its findings of fact and conclusions of law, and filed its Memorandum Decision and Judgment.

Appellants contend that the court erred as follows:

1. In excluding said evidence tending to show fraudulent misrepresentations and a general fraudulent plan and scheme offered to establish the fact that respondent was a partner, was prejudicial error.

2. In finding that the respondent, Wilbert C. Hamilton, is not indebted to petitioning creditors, or any of them, in any amount whatsoever.

3. In directing the court reporter not to report certain remarks of the court made during the trial.

4. By reason of error and misconduct of the court which prevented appellants from having a fair trial of the issues framed by the pleadings.

I.

The Court Erred in Excluding Said Evidence Tending to Show Fraudulent Misrepresentations and a General Fraudulent Plan and Scheme, Offered to Establish the Fact That Respondent Was a Partner, Which Amounted to Prejudicial Error.

No written agreement of partnership is known to exist between the respondent and the admitted partners of the said partnership. Appellants were therefore placed in the position of proving respondent a partner by showing an ostensible partnership, by statements, acts, or conduct of the respondent, amounting to an estoppel. The court wholly excluded this evidence by its specific rulings thereon, as shown:

> "The Court: What is the materiality of that? We are not trying a criminal law suit here. We are trying a simple law suit. This isn't the first one of this kind that I have tried. I have tried a lot of them. I know the temptation there is, especially when your clients are sitting in the court room, who were investors, to air everything in court, *but this is no place to determine anything except the simple proposition: Is Mr. Hamilton a member of this partnership, and is it insolvent? Otherwise I am not interested.*
>
> Mr. Slate: This is offered to show the complete cooperation that existed between Mr. Brunson and

Mr. Hamilton in all matters, even extending to that matter.

The Court: That does not make any difference, the fact that he appeared in the District Attorney's office. That does not prove partnership." [Tr. of Record p. 133.]

* * * * * * * *

"The Court: You may know the fact. I don't know. It may or may not. If Mr. Hamilton sat in other than as an attorney, as a principal, and discussed with persons, say, representatives of the Board of Trade, presenting an assignment to creditors, that may have a bearing on whether by any actions he acknowledged he was a partner or had an interest in it. The rights of the parties, the contractual rights of the parties are determined by the law of the state in which we sit, and whether or not a man is a partner has to be determined under the law of California. And under the law of California it isn't necessary that you write an agreement of partnership. If, as a matter of fact, he participates in the profits of the corporation, even though there may be two or more in the venture and even though there be no written agreement, the court may find a partnership actually existed, even though the man denies that it exists. That is the law which governs here, the law of California. So that the proof as to the existence of a partnership must be of a very broad nature. . . .

Mr. Utley: I understand that.

The Court: —because of the nature of the matter. Therefore, admissions, participation, suggestions for control, and the hearing of complaints are just as revealing to a person who, like myself, is charged with the duty of finding or not finding a partnership as the actual splitting of profits. And if this were before a jury, I would have to instruct the jury

that in determining whether a partnership exists they have a right to find and to consider what, if any, profits were divided, and also, whether the man participated in the management, whether he had something to say about policy, whether he had control over the other men whose names actually appeared and who—I don't mean to use the word disparagingly—who fronted for the men behind the facade. I am using it in the ordinary sense, and not in a disparaging sense. For that reason the scope of the inquiry must be broad. Therefore, while I am going to limit the inquiry to the particular issues, in proof of the particular issues I am going to allow all matters which are relevant to prove participation, which may make him a partner, whether he actually signed his name to it or not, because we are not dealing here with a law suit between two partners. We are dealing here with the rights of third parties, that is, creditors, and the law is entirely different. What may not be sufficient to establish a partnership as between two partners, who sue each other to try to prove the existence or non-existence of a partnership. . . .

Mr. Utley: I think I understand.

The Court: . . . may be sufficient when we are talking about the rights of third parties as against those two. An entirely different type of proof is required. If you want to determine what is required under the law of California, all you have to do is to go to the Blue Book to see what is and what is not necessary to prove partnership. For that reason many of these incidents which would have no bearing if Mr. Bunch and Mr. Brunson were suing Mr. Hamilton in a civil suit of a type which can be brought between partners, such as a dissolution of partnership, or the like, or for an accounting of profits, then that

type of evidence would be insufficient to establish such a relationship, but it might be ample in a suit like this, which is a suit by creditors to hold a man to responsibility as a member of a partnership." [Tr. of Record pp. 135-137.]

* * * * * * * *

"The Court: *What bearing does the fact that the man invested money have upon the partnership? You may sit down now.*

Mr. Slate: *To prove how the funds were taken from the investors and given to Mr. Hamilton. We have a list of items here, of approximately 60 individual and separate items, most of them involving these people who put their money in, and show the partnership between Mr. Hamilton and Mr. Brunson. As Your Honor knows, we have had a terrible time to get this list.*

The Court: *The question of how that was put up is not material. It is what he did with it as to the partnership.*" [Tr. of Record p. 140.]

* * * * * * * *

"Mr. Lane: But that is why we brought them in, to prove that Mr. Hamilton went out himself and made these representations, participated in it, and told these different people different things.

The Court: Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other reasons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have." [Tr. of Record p. 144.]

* * * * * * * *

"The Court: Gentlemen, let us get away from this idea that I am trying a question of fraud here. I am not trying a question of fraud or anything else. I am trying to establish if there is a partnership and who composed it and if it is insolvent." [Tr. of Record p. 180.]

* * * * * * * *

"Mr. Slate: Your Honor, we want to get it through as soon as possible, and we would like to finish it tomorrow.

The Court: I cannot see why it can't be finished tomorrow.

Mr. Slate: Here is the reason: our further evidence has to do to a great extent with an audit that has been made over a period of eight months by a certified public accountant, and it took me about three weeks to understand the transactions.

The Court: Well, you don't have to explain that all now. Counsel, here is the point. The rule of the federal court is this—pardon me if I seem didactic; although it is over ten years since I taught in law school, I still retain the habit—but I am merely indicating what the law is so that you may be guided by it. In the law in the federal court we have a very salutary rule, and that is that summaries of public accountants are received in evidence upon their being identified, providing the books, the originals are available so that your adversary can consider them. I cannot see why counsel under the circumstances cannot stipulate to the summary. They can stipulate what checks show, what money went in, what sums of money and where they went, and then the question of the inference to be drawn would become a question of law, because I don't want the accountant to be a lawyer, I like them to keep their province. As a matter of fact, we have great difficulties with them, it

is a difficult job to keep them within limits, because they will talk at the drop of a hat about discovering a 10-cent error. Their work is trying to discover somebody else's error. So I don't see that it is necessary or that it would even be permissible for you to go through that and take a week to explain to me what is in it.

Mr. Slate: Your Honor, the report after it finally came from the auditor and which we have gone through finally with the auditor's help, we have found a series of transactions, one right after another, during this pertinent period, all tending to show partnership and that Mr. Hamilton was actually the dominant figure in the business known as Brunson and Bunch.

The Court: All right; but supposing they stipulate, without admitting the conclusions, stipulate that this is a correct summary of these transactions as of their appearance in the book—that is all I will allow you to do—not that I will allow you to do, but that is all that is necessary as a factual basis. Then the question of analysis is one which is a matter of argument for you to address to me either orally or in writing, and is one to be determined after the evidence is in. What I want to do is to get all the evidence in so that there will not be a hiatus, and then you gentlemen can brief it and I will read your briefs, wherever I am, and determine the matter and if I believe that I need additional oral arguments, I will set a time for the argument when I get back in September. I can set some Monday for additional oral argument.

Mr. Slate: Your Honor, most of this money, or not most of it but a large block of this money, did not go through the books, was handled in cash transactions, cashier's checks and actual cash given, and

cannot possibly be explained through the auditor's summary. I feel we will want to show that these transactions were not legitimate.

The Court: If they were not legitimate, that is an inference to be drawn. Let us talk informally. Let's talk off the record and see what we are going to do." [Tr. of Record pp. 183-185.]

* * * * * * * *

"The Court: I am not going to make any order at the present time. I think this is developing into such a wide expedition here that we are duplicating everything that was done. You will have to show me as to each specific thing that you don't have a copy of or that this wasn't available to you, because *I am not going to take an accounting here,* as I told you before. If you want an accounting, I will send you to a master. But, I have to determine, first, whether there was an act of bankruptcy committed and whether Mr. Hamilton was a member of a partnership, before you get down to an accounting, and the object of this trial is to take evidence from which the court can determine whether a partnership existed.

Mr. Slate: What we are attempting to prove—

The Court: I know what you are attempting to prove. You cannot prove it on cross-examination by this manner. You have this witness under oath. He admits the check and I am not going to tell him to bring in the cancelled checks. You are going to be ordered to ask him only on such documents as you have now." [Tr. of Record p. 189.]

* * * * * * * *

"Mr. Slate: What we really want to show there is that Mr. Hamilton out of his personal account paid a partnership debt.

The Court: All right. You have his admission, what he did, and the check won't show any more than what it contains, and that is all there is to it.

Mr. Slate: Then, the court will not have him bring in that check?

The Court: You can argue that. I am not going to make any order in regard to that check." [Tr. of Record pp. 191-2.]

Seymour v. Oelrichs, 115 Cal. 782 at 795-7, 106 Pac. 88;

Bedell v. Morris, 63 Cal. App. 453 at 456, 218 Pac. 769.

II.

The Court Erred in Finding That the Respondent, Wilbert C. Hamilton, Is Not Indebted to the Petitioning Creditors, or Any of Them, in Any Amount Whatsoever.

In each of the findings designated (e) (f) (g) and (h), the court found "that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner (naming petitioner) in any amount whatsoever." [Tr. of Record pp. 79-80.]

Items 5, 6, 7 and 8 of Statement of Points Upon Which Appellants Intend to Rely on Appeal specify the error in said findings. [Tr. of Record p. 202.]

In his opening remarks, the court stated "all we are interested in is to find out or determine whether there is an insolvency in the case, and whether Mr. Hamilton is a member of the partnership that is insolvent." [Tr. of Record p. 132.]

Throughout the entire trial, the court repeatedly reiterated this position, and continually ruled against the

admission of evidence not specifically directed to the said two points, insolvency and partnership.

On numerous occasions when appellants attempted to present evidence bearing upon the matters covered by said findings, the respondent objected thereto and in each instance the court sustained objections and refused to admit such evidence.

Again at page 133 of the Transcript of Record, we find the following statement by the Court:

> ". . . but this is no place to determine anything except the simple proposition: Is Mr. Hamilton a member of this partnership, and is it insolvent? Otherwise I am not interested."

We quote other statements by the Court as follows:

> "By the Court: . . . I do not intend to keep this proceeding before me except for the purpose of this trial and to determine this issue." [Tr. of Record p. 134.]

> "By the Court: . . . so after I decide this one matter, then it will go back and all further proceedings will be had before the Referee. . . ." [Tr. of Record p. 134.]

> "By the Court: . . . After all, I have developed some technique in my time as a judge. This is my twenty-first year as a judge, so you gentlemen ought to know by now that I do not allow any wild goose chase." [Tr. of Record pp. 137 and 138.]

The following is found on page 140 of the Transcript of Record:

> "The Court: What bearing does the fact that the man invested money have upon the partnership? You may sit down now.

Mr. Slate: To prove how the funds were taken from the investors and given to Mr. Hamilton. We have a list of items here, of approximately 60 individual and separate items, most of them involving these people who put their money in, and to show the partnership between Mr. Hamilton and Br. Brunson. As your Honor knows, we have had a terrible time to get this list.

The Court: The question of how that was put up is not material. It is what he did with it as to the partnership."

On page 143 of the Transcript of Record, the Court is quoted:

". . . But once more I say that I am not interested now in the accuracy of the books. I am interested in just one thing, was he a partner, and the amount of money he turned over, and does it bear on the partnership? When I have decided that question, and when I find there is bankruptcy and that he is a partner to it, that he is insolvent in his individual capacity, then I will send you back to the referee, and if that referee will not hear it, I will change the referee, I will appoint one who will hear it, and then all these people who did not get their money will have their chance in court to prove their claims. I am not establishing claims here. That is not the function of a judge.

Mr. Lane: But that is why we brought them in, to prove that Mr. Hamilton went out himself and made these representations, participated in it, and told these different people different things.

The Court: Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other rea-

sons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have."

The following conversation is reflected on page 147 of the Transcript of Record:

"Mr. Lane: . . . We also had the further purpose that if the issue was properly to be presented on the question of fraud, that she would be here on that. Now the court has ruled on that, and that point is eliminated. But in regard to the establishment of solvency or insolvency we believe that she is—pardon me. Let me put it this way: We believe she may be a very material witness.

The Court: All right. Put her on. . . ."

Page 153 of the Transcript of Record:

"The Court: I will deny the motion. Do you want to ask any questions?

Mr. Utley: Certainly, there is nothing there that tends to prove or disprove a partnership.

The Court: I have something in mind. I can't tell you yet. You will have to use your own judgment."

Page 173 of the Transcript of Record:

"The Court: I can't agree with your conception of the case, as to what you have to prove in this case. All you have got to prove is insolvency, and in this case that he is a partner."

Page 180 of the Transcript of Record:

"The Court: Gentlemen, let us get away from this idea that I am trying a question of fraud here. I am not trying a question of fraud or anything else. I

am trying to establish if there is a partnership and who composed it, and if it is insolvent."

Page 189 of the Transcript of Record:

"The Court: . . . I am not going to take an accounting here, as I told you before. If you want an accounting, I will send you to a master. But, I have to determine, first, whether there was an act of bankruptcy committed and whether Mr. Hamilton was a member of a partnership, before you get down to an accounting, and the object of this trial is to take evidence from which the court can determine whether a partnership existed."

Pages 190-1 of the Transcript of Record:

"Mr. Utley: Just a moment, your Honor. Your Honor, how could this possibly be material to any of the issues in this case? And I object to it on that ground. Whether he received it or didn't receive it would not show whether or not he was a partner, it wouldn't show whether or not he was insolvent. It has nothing to do whatsoever with the issues in this case."

Page 194 of the Transcript of Record:

"Mr. Slate: Your Honor, such proofs of the actual bankruptcy as have been submitted during this trial have been wholly incidental, as we have been relying upon the point, as I understood it, that the sole issue before the court was that of partnership with Mr. Hamilton."

Page 199 of the Transcript of Record:

"The Court: Now we are not here to determine as to what is right or what is wrong in that respect; we are here to determine whether these people dealt with Mr. Hamilton as a partner and whom they were to look to for their guarantee. . . ."

III.

Error and Misconduct of the Court in Directing the Court Reporter Not to Report Certain Remarks of the Court Made During the Trial.

The inconsistency and unfairness of the Court, as demonstrated by the foregoing third point in this brief, is further and more forcibly demonstrated by the Court's conduct and statements at the conclusion of the morning session on the second day of the trial, to-wit, June 30, 1948, at about the hour of 12:40 o'clock P. M., as shown by the affidavits of Glenn A. Lane, G. N. Williams, H. H. Slate, and George B. McClyman, made and filed in support of Appellants' Motions for New Trial and to Set Aside and Vacate Judgment. [Tr. of Record p. 97.]

We quote from the Transcript of Record, commencing on page 98 and continuing to page 103:

> "That at about the hour aforesaid, and while the Honorable Leon R. Yankwich was presiding in the trial of the issues of said case, the said Honorable Leon R. Yankwich stated that the court was then adjourning for the usual noon recess; that counsel should prepare themselves for night sessions to try said case, because the Court was scheduled to leave for San Francisco, California, to try other matters, at the conclusion of the next day, to wit, July 1, 1948, and that the Court was going to finish the trial of the issues then pending before the Court in the above-entitled matter, within the period of three days, to wit, June 29, June 30 and July 1, 1948, which he had allotted to said case, and that if it was necessary to stay over for night sessions, the Court was giving counsel fair warning at that time that the Court would still see that the case was finished within that time;

"That the Court further stated that if said case was not completed at the conclusion of the next day, that the Court would declare a mistrial, and would send the case back for trial before some other Judge;

"That the Court thereupon reiterated its remarks that the case would have to be completed within the period of three days' total time allotted by him to the case, and that if it was not completed by the end of the next day, he would declare a mistrial; that he, the Court, had set aside three days for the case, and that was all the time that was going to be allotted to the case; that there was no reason why said matter could not be completed within the said three days, and that counsel could prepare themselves for night sessions;

"That the Court further stated that the only issue before the Court was the simple question of determining whether or not the respondent, Wilbert C. Hamilton, was a partner in the firm of Brunson & Bunch, and that the case was going to be completed within the said three days, or the Court would declare a mistrial;

"That Affiant thereupon stated to the Court that 'Your Honor, if that is the decision of the Court, you might just as well declare a mistrial at this time, because this case cannot be completed by tomorrow night, and in our opinion, the trial of this case will require at least four weeks.'

"That thereupon the said Court stated that this case was going to be completed within the three days' time allotted to it, and that 'there is no reason why the simple question of whether or not Hamilton is a partner should consume any more time than three days,' and that the Court was not going to declare any mistrial; and that counsel could come back at

2:00 p. m. and the case would proceed to trial and would be completed within the time allotted to it, and there was no reason why the case should consume four weeks, and the Court could not see how it could possibly consume four weeks;

"That the Court thereupon stated, 'You told me that this case would take only three days to try. When this case was set for hearing at the previous date, I said that I could continue it to this date, and that it would have only three days, and you told me that you could try this case within three days.' Affiant then stated to the Court, 'If the Court please, the Court's statement is in error, because I was not even present in Los Angeles County at the time that this matter was continued, and I have never at any time made any statement to the Court to that effect, and I was not present at any time when I could have made any such statement, and in fact, at the time that the Court claims I made such a statement, I was in San Francisco.'

"That the Court thereupon stated, 'Well, somebody said it would take only three days.' Affiant thereupon stated, 'I was not present at the time that the matter was continued, but it is my understanding that opposing counsel made the statement at that time as they have made on other occasions when I was present, that the case should be tried and completed in three days.' The Court thereupon stated in effect that Affiant had deliberately misled the Court and that Affiant as 'now attempting to mislead the Court' by his actions, and that the Court had no intention of granting a mistrial, now that the case had proceeded thus far, and that Affiant's 'attempt to get the Court to grant a mistrial' was very unfair to the Court, and that the Court was 'being imposed upon' by Affiant, and that if Affiant would 'get down and try the case

and quit trying to get into issues that have nothing to do with the case,' that the case could be completed in three days and within the time allotted, and that the Court was refusing to declare a mistrial, and would not let the petitioning creditors and their attorneys 'get out of trying this case, now that we have gone this far.'

"That Affiant thereupon noted that the court reporter was sitting at his desk and not taking down any of the remarks of the Court, or any of the proceedings that were then transpiring; that Affiant thereupon stated to the Court substantially as follows: 'I notice that the reporter is not reporting these proceedings and is not taking down the statements of the Court, and I believe that these proceedings are very important, and that the remarks of the Court are very pertinent, and that the reporter should be reporting all of these proceedings, and I ask the Court to please instruct the reporter to take down all of the proceedings that are now transpiring, and to report the remarks of the court and any remarks that I make, or any other counsel in this proceeding.' The Court thereupon stated, 'He doesn't have to report these proceedings, and I am instructing him not to report what I am saying to you and what you are saying at this time. He is my reporter, and I will tell him "what I want him to report, and you won't tell him what is to be reported, and you won't tell me what is to be reported. I am running this court room, and I will have my reporter report what I want him to report, and when I want to make remarks directed to you like I am doing, I don't want my reporter to take those down, and I am telling him right now not to take them down. I have a right to tell you what I think about the way you are trying the case, and I have a right to talk to you about this case

without having the reporter write down what I am saying. I will run this case in my own way, and I will run this court room in my own way, and you are not coming up here and telling me how to run my court and how to try cases. I have been trying cases for 21 years, and I know how to run my court, and you are not coming up here and telling me when and what my reporter will report on these proceedings and how I will try the case. My reporter will not report these remarks, and that is the way I am going to run my court.'"

"Affiant thereupon stated, 'I believe that your Honor's ruling is erroneous and that we are entitled to have all of the remarks of the court which are made in the conduct of the trial of the case, and particularly any remarks made in the open courtroom, reported by the reporter, and I assign the remarks just made by the Court as error, and I object to the Court's remarks and object to the Court's ruling, and again ask the Court to instruct the reporter to record all of the remarks made by the Court or by me or by any other counsel in these proceedings, and I ask the Court to immediately instruct the reporter to take down what I am saying right now, and to report every remark hereafter made by the Court.'

"That the Court thereupon stated that the reporter would not report 'any part of it,' that the Court was not in session, that he had taken a recess and that he would 'run my trial the way I want to,' and that the 'attempt' on the part of Affiant to get a mistrial was unfair to the Court; that counsel 'had misled the Court from the start,' and that the Court wasn't trying 'to force anybody to do what is impossible,' but that the Court saw no reason why the case could not be completed within three days' total time, and that

counsel could come back at 2:00 o'clock and put on his witness and proceed with the trial of the case, and that the case was definitely going to be completed by the end of the next day.

"That the Court then stated, 'You will come back into this courtroom at 2:00 P. M., and you will put on Mrs. Hamilton, the wife of Mr. Hamilton, as your next witness.' "

It is notable that the affidavits were never controverted by the Court, or any of the attorneys, or by the respondent, Wilbert C. Hamilton. In this respect, it is important to note that the affidavits were filed with the Court in support of the Motions for New Trial and to Set Aside and Vacate Judgment, and that the Court acknowledged that he had read the same, and commented thereon at the time of the hearing on said motions. At no time did the Court, or anyone else, ever deny the accuracy of any of the statements contained therein.

The attitude and conduct of the Court made it impossible for the appellants to have a fair and impartial trial upon the issues of the case. From the inception of the case, commencing with the Court's opening statement, continually throughout the trial and in his closing remarks, the Court ruled that no evidence would be admitted except upon the issues whether Hamilton was a partner, and whether the partnership was insolvent. Notwithstanding the exclusion of evidence directed to prove the general plan and scheme on the part of Hamilton and the admitted members of the partnership to perpetrate fraud and deceit, and the exclusion of evidence offered to prove that the funds of the investors found their way through devious and intricate transfers from respondent Hamilton's trustee bank accounts, his wife's personal and trust

accounts, into Hamilton's personal account, the Court made specific findings that Hamilton did not borrow money from the appellants, and was not indebted to any of the appellants "in any amount whatsoever," and that the "dealings between the respondent, Wilbert C. Hamilton, and the partnership . . . were governed by agreements . . . whereby, in consideration of the respondent's furnishing money belonging to his clients or to trusts over which he had control, a definite percentage of the profits were promised" and "no other representations were made by the respondent, Wilbert C. Hamilton, to any of the clients."

People v. Reese, 136 Cal. App. 657, 29 P. 2d 450;

Podlasky v. Price, 87 Cal. App. 2d 151, 196 P. 2d 608;

Etzel v. Rosenbloom, 83 Cal. App. 2d 758, 198 P. 2d 848;

Murr v. Murr, 87 Cal. App. 2d 511, 197 P. 2d 369.

We quote from the *Podlasky* case, commencing at page 164:

> "If no other grounds for reversal existed, the conduct of the trial judge alone would adequately supply them. Judge Burnell at various stages of the trial made statements calculated to intimidate the litigants and their counsel and to confuse the witnesses."

We quote from the *Reese* case, commencing at page 666:

> "By the Court: If he is (has returned to the state), anyone that wishes can put him on the stand, but the idea is to get the facts before this jury, and not to play a game to see how many points either side can win.

"When complaining witness had testified that he had paid the sum of $20,000 to one of the defendants in connection with the sale of shares of stock, the attorney for the People asked him:

"'Q. Did you get anything for that $20,000? A. Not a thing.' The judge then interposed the following question: 'You got experience, didn't you? A. Plenty of that.'"

We quote from the *Murr* case, commencing at page 520:

"It is therefore clear that such conduct on the part of the trial judge deprived the plaintiff of a fair trial. In such a case, which included close questions pertaining to the laws of nature and to medical science, the judge's comment that the case should be tried in 10 or 20 minutes and his many other ill-advised and unnecessary comments with respect to wasting his time establish definitely that he did not consider that the issues presented by plaintiff were worthy of consideration."

". . . so you, gentlemen, ought to know by now that I do not allow any wild goose-chase." [Tr. of Record p. 138.]

"Mr. Lane: Thank you, your Honor. Now, I would like to state this, that so far as any witness that can be called on the telephone, it is perfectly agreeable that he leave, with the understanding he is subject to call.

The Court: I am not making any orders about call on the telephone except as to Mrs. Hamilton. I am just making the order with reference to her.

Mr. Lane: But I wanted it clear that we are perfectly willing to follow through in that way.

The Court: That isn't the point. I am not interested in what you are wanting to do on that. I have already indicated that you appear not to be willing to do anything except to follow your own ideas, and so I am exercising my own prerogative in running this court." [Tr. of Record p. 151.]

"The Court: I will deny the motion. Do you want to ask any question?

Mr. Utley: Certainly, there is nothing there that tends to prove or disprove a partnership.

The Court: I have something in mind. I can't tell you yet. You will have to use your own judgment." [Tr. of Record pp. 153-4.]

"The Court: Judges never get into this type of thing because they haven't enough money to spare. They have to raise a family on a salary; unless they have been on the bench and retire and capitalize on any reputation they make. But real judges, who stay on the bench, and not men who have been there and gone into private practice do not get involved in this type of thing." [Tr. of Record p. 156.]

"The Court: I tell you, you come back tomorrow at 2:00 o'clock. If they haven't reached you by that time, I will make them put you on anyway." [Tr. of Record p. 162.]

The conduct of the trial court in the case at bar, as shown by the portions of the transcript quoted above, indicates error far exceeding the conduct of the trial judge in the *Podlasky, Reese* and *Murr* cases.

IV.

By Reason of Error and Misconduct of the Court Appellants Were Prevented From Having a Fair Trial of the Issues Framed by the Pleadings.

First, the trial court did not permit appellants to introduce any testimony or evidence tending to show fraudulent representations made to appellants and other creditors of the partnership or tending to show a general plan and scheme, between respondent and the two admitted partners of the bankrupt partnership, to defraud appellants and other creditors. As pointed out in appellants' Point I herein, the existence of a partnership in which respondent was a partner could be shown only by establishing the fact that respondent was an ostensible partner. For instance, that he held himself out by his representations to appellants and other creditors of the bankrupt partnership, to be the source of the money used in the operation of the partnership business; also, by showing the existence of a partnership in which respondent was a partner by testimony and evidence of a general plan and scheme between respondent and the admitted members of the bankrupt partnership, to defraud appellants and other persons investing their money in the partnership business. On the contrary, the trial court restricted appellants in the introduction of the testimony and evidence to testimony and evidence of direct statements by respondent of his interest, if any, in the said partnership, and of his acts and conduct only to the extent that such acts or conduct might show a sharing of profits or an exercise of managerial authority over the affairs of the partnership. As thus restricted, appellants were prejudiced in presenting their case, since the facts in their possession showed a concerted and well thought out plan and scheme to corral large amounts of

money from appellants and other investors and the use of that money, by respondent, and the other members of the partnership, for purposes wholly foreign to and entirely disconnected from the purposes for which the monies were invested in the partnership and the representations of respondent by which such investments were obtained. It is obvious, therefore, that the restriction as to testimony and evidence made by the trial court wholly prohibited appellants from showing the true situation, as it in fact existed, and which appellants offered to prove by means of the auditor's report and the tracing of funds through respondent to the partnership and back to the respondent, under circumstances that were clearly prohibited by the terms and conditions under which those monies were invested.

Second, the action of the trial court in arbitrarily limiting the reporter in recording the actual happenings in open court show an attitude on the part of the Court to run the Court for the judge's own purposes and not for the benefit of litigants. As set forth in appellants' Point II herein, there arose and were decided and ruled upon by the Court important questions of procedure and the order of presentation of appellants' case. It should be remembered that at the commencement of the trial the trial judge refused to hear any opening statement by appellants or respondent, and the judge therefore could have had no clear conception of the order of proof of appellants' case. [Tr. of Record p. 133.] Appellants on several occasions attempted to point this matter out to the trial judge, but were repeatedly overruled, and it was only after appellants' counsel's insistence to an extreme degree that the trial judge acceded in part to appellants' theory of presenting the case. Furthermore, the citations from the Transcript of Record under appellants' Point III herein show an attitude on the

part of the trial judge to try the case himself, and clearly indicate that the matter was largely prejudged by the trial court.

Third, after limiting appellants to the type and *quantum* of evidence on the issue of partnership, the trial court then proceeded to make findings of fact, as pointed out in appellants' Point II herein, to the effect that "respondent is not indebted to petitioning creditors" (appellants herein), and that the respondent made no representations to them. This was clearly error, for the reason that appellants were not permitted to show whether or not respondent did in fact make representations to them, and what those representations were. The trial court arbitrarily assumed that since they tended to show fraud, they were not admissible at the trial upon any other theory.

All of the foregoing, taken and considered in its entirety, clearly shows that appellants were effectively prevented from having a fair and impartial trial of the issues framed by the pleadings.

Wherefore, appellants respectfully pray that the judgment be reversed and that a new trial be ordered, and for such other and further relief as the justice of the case might require.

Respectfully submitted,

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